we submit that the competency of Judge Madden to participate in the judgment below may be and should be reviewed by this Court, and therefore that certiorari should be granted with respect to question (d) of the Petition.

While this is not an appropriate occasion for a detailed discussion of the merits of petitioner's contention, we should make clear our conviction that petitioner is wrong on the merits of the issue and that Judge Madden's participation in the hearing and decision of the Court of Appeals was entirely proper. As shown in the brief filed last term in the *Lurk* case on behalf of the Judges of the Court of Claims as *amici curiae,* the *Williams* case erred in holding that the Court of Claims was created as a legislative rather than a constitutional court. Moreover, the 1953 statute declaring the Court of Claims to be a court created under Article III of the Constitution is constitutional and establishes the present status of the Court of Claims as a constitutional court even if *Williams* was correctly decided at the time. See *Postmaster-General* v. *Early,* 12 Wheat. 136, 148. If the Court of Claims is a constitutional court, as we believe, its judges, including Judge Madden, unquestionably may be assigned to serve on other constitutional courts such as the Court of Appeals for the Second Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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I.

There is a conflict between the decision here and the decisions in other circuits.

At pages 12, 13 and 14 of their brief in opposition to the granting of the petition for certiorari, respondents say that the Court of Appeals decision here is not in conflict with the decisions of the Fifth, Sixth and Seventh Circuits i.e. *Local Lodge 2040, International Association of Machinists* v. *Servel,* 268 F. 2d 692 (C. A. 7th Cir. 1959), cert. den. 361 U. S. 884 (1959); *System Federation No. 59 of Ry. Employees* v. *La. & A. Ry. Co.,* 119 F. 2d 509 (C. A. 5th Cir. 1941), cert. den. 314 U. S. 656 (1941); *Elder* v. *N. Y. Central R.R. Co.,* 152 F. 2d 361 (C. A. 6th Cir. 1945).

It is true that the facts in those cases are not identical with the facts in the instant case. However, the underlying rationale of these cases is that seniority rights exist *only* during the term of the collective bargaining agreement providing therefore, or *only* during the term of an employer and employee relationship, and that *upon the termination of either the collective bargaining agreement or of the employer and employee relationship such rights cease to exist.*

For example, in *Servel* the employees contended that when they were notified of the discontinuance of the manufacturing operations by Servel and of their discharge,

> " * * * they then achieved the status of laid-off employees with two years seniority from the time of layoff as provided in the agreement. They also contend that this status gave such employees the vested right to maintain their group life insurance during the two years, their hospitalization insurance for one year, the right to certain wage benefits and the right to retire under the pension plan if they reached the age of 65 years during this two year period following layoff during which they retained seniority" 152 F. 2d, at 697.

It is stated by the Seventh Circuit at page 698:

> "Contrary to appellants' contention, we find nothing in the agreement providing for a *permanent* [emphasis in original] layoff status to these employees or giving vested rights to seniority for two years following their layoff. *Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge its employee [emphasis added].*"

In this case respondents' employment was in fact permanently terminated, concededly in good faith.[1] There was no layoff,[2] as erroneously assumed by Judge Madden and as erroneously stated by respondents.

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[1] See p. 8 of petition; vol. 1 pp. 89a and 90a of certified record.

[2] See p. 8 of petition. Footnote 2 on page 8 of respondents' brief in opposition refers to the provision in the collective bargaining agreement relating to "continuous layoff" and says that petitioner overlooks this provision in stating that there was a termination of employment. The fact in this record which cannot be ignored is that *there was not a layoff* of any of these respondents. There was a termination of employment as noted in the record referred to. There is no evidence in the record to suggest otherwise.

Respondents say in this same footnote that petitioner "* * * begs the question at issue: did petitioner have the contractual right to terminate respondents' employment in the circumstances here involved?" Of course there is no provision in the collective bargaining agreement specifically granting to petitioner the right to terminate respondents' employment in the circumstances here involved. Petitioner's right to terminate respondents' employment (subject only to the provisions of the collective bargaining agreement containing no pertinent restrictive provisions covering the circumstances here involved) has never been questioned either in the pleadings here or in the arbitration proceedings where the collective bargaining agent of respondents attempted unsuccessfully, 10 Misc 2d (N. Y.) 700; 172 N. Y. S. 2d 678 (1958), to secure arbitration with respect to matters identical to the matters in issue here. Indeed, the petitioner's right to terminate respondents' employment in the circumstances here involved is universally recognized in law without a specific contract provision therefor. *Local Union 600* v. *Ford Motor Company,* 113 F. Supp. 834 (USDCED, Mich. SD 1953); *Auto Workers* v. *Federal Pacific Co.,* 36 LRRM 2357 (USDC —D. Conn. 1955) (not officially reported); *Parker* v. *Borock,* 5 NY 2d 156 (1959); *Matter of Kosoff,* 276 App. Div. (N. Y.) 621 (1st Dept. 1950)—aff'd 303 N. Y. 663 (1951); *Paul* v. *Mencher,* 169 Misc. 657 (Sup. Ct. N. Y. Co. 1937)—aff'd 254 App. Div. (N. Y.) 851 (1st Dept. 1938)—leave to appeal den., 279 N. Y. 813 (1938). And, of course, and more significantly, there was no contractual provision that petitioner would continue respondents or other employees in its employment for any length of time so that seniority rights or other rights under plans beneficial to them could mature or that respondents' employment could not be terminated upon the termination of the collective bargaining agreement or upon the closing of operations at Elmhurst where they had been employed.

Of course, the foregoing is merely a brief discussion of merits relating to matters which may be urged and answered more fully upon the granting of certiorari.